IWAN LIAW v. PP

HIGH COURT SABAH & SARAWAK, KUCHING
CHRISTOPHER CHIN SOO YIN JC
[CRIMINAL APPEAL NO: KCH-42ORS-2-5-2019]
20 AUGUST 2019

CRIMINAL LAW: *Immigration Act 1959/63 – Section 6(1)(c) – Accused charged with 'entering Malaysia without a valid Pass' – Accused born in Sarawak to Indonesian mother, deemed an Indonesian national but never left Sarawak – Key ingredients – Element of 'entry into Malaysia' – Whether totally absent – Whether accused wrongly charged – Whether ought to be acquitted and discharged – Immigration Act 1959/63, s. 6(1)(c)*

CRIMINAL PROCEDURE: *Revision – Revisionary powers of High Court – Conditions precedent – Whether exercisable when court having before it record of criminal proceedings on appeal – Whether could probe into other aspects of appeal to achieve substantial justice – Criminal Procedure Code, s. 325*

The appellant, who was born out of wedlock in 1997 in Sarawak to a Sarawakian father and an Indonesian mother, was deemed an Indonesian national by the Registration Authorities and was issued with a birth certificate that identifies his nationality as such. The Indonesian nationality notwithstanding, the appellant had his primary and secondary education in Sarawak, and indeed had never left Sarawak or set foot in Indonesia. The facts further showed that since 2010, attempts were made for the appellant to be granted a Malaysian citizenship, but to no avail. On 14 April 2019, the appellant was arrested by the Immigration Authorities and charged in the Sessions Court with the offence of 'entering Malaysia without a valid Pass' under s. 6(1)(c) of the Immigration Act 1959/63 ('the Act'), and, upon his guilty plea, was sentenced to four months' imprisonment and one stroke of the rattan. The appellant appealed. The Judicial Commissioner, upon appraising the facts, however, deemed it proper and warranted to deal with the appeal by exercising his appellate and revisionary powers, and in the circumstances, took the liberty to examine the records of proceedings in the court below with a view of determining the correctness, legality and appropriateness of its decision and findings.

Held (allowing appeal; quashing conviction and sentence):

(1) It is settled law that when the High Court has before it on appeal a record of criminal proceedings, the conditions precedent for the exercise of the power of revision has been fulfilled. It is also evident that the duty of a High Court Judge sitting in his revisionary capacity is not confined to matters raised by the parties, but that he may, in appropriate cases, pry deeper into the aspects of the case in order to do substantial justice to the parties. (paras 18 & 19)

(2) In Sarawak, the Guardianship of Infants Ordinance (Cap 93) does not make a distinction between a legitimate or illegitimate child in guardianship matters and thus is at odds with the practice of causing an illegitimate child to automatically follow the mother's nationality. In Sarawak, the rights of each biological parent appear to rank equally. (para 31)

(3) The appellant had spent his entire life in Sarawak, knew no other country which he could call home, had never stepped outside Sarawak nor into Indonesia and had not been issued with an Indonesian passport to evidence the alleged nationality in his birth certificate. The appellant, through no fault of his, had become an alien in his own country. (para 5)

(4) The appellant was not an 'illegal immigrant' because he never entered Sarawak from another sovereign State, and that being so it was wrong for him to have been charged under s. 6(1)(c) of the Act. The key ingredient to the offence under s. 6(1)(c), namely 'entry', was clearly absent, and in any case, is inapplicable to a locally born person such as the appellant. The court was therefore left with no alternative but to allow the appeal and acquit and discharge the appellant. (paras 20, 21, 24 & 34)

Obiter:

(1) The ruling of this court quashing the conviction and sentence against the appellant ought to be served on the Immigration Department with an express request that the appellant's application for citizenship be quickly processed.

Case(s) referred to:

Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC ***(refd)***
Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur [1995] 2 CLJ 209 CA ***(refd)***
PP v. Mohd Tajuddin Ahmad [1997] 2 CLJ 913 HC ***(refd)***
Re Pang Po Pah [1982] CLJ 557; [1982] CLJ (Rep) 623 HC ***(refd)***
Sukma Darmawan Sasmitaat Madja v. PP [2007] 4 CLJ 697 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 35(1)
Criminal Procedure Code, ss. 152, 305, 316, 325
Guardianship of Infants Ordinance (Sarawak) (Cap 93), s. 2
Immigration Act 1959/63, ss. 2, 6(1)(c)
Interpretation Acts 1948 and 1967, s. 4(1)

Other source(s) referred to:

Civil and Criminal Appeals in Malaysia, Sweet and Maxwell, 3rd edn, pp 383, 384, 387
Janab's Key to Criminal Procedure, 4th edn, p 348

For the appellant - Osman Ibrahim & Fadzillah Osman; M/s Osman Ibrahim & Co
For the respondent - Hayda Faridzal Abu Hassan; DPP

Reported by Wan Sharif Ahmad

JUDGMENT

Christopher Chin Soo Yin JC:

Background

[1] This is a most unfortunate case about the hapless appellant suffering for the sins of his father. The appellant was born, out of wedlock, from the union of a Sarawakian Chinese father ("Liaw Chee Khing" WM KP 650317-13-5603) then aged 32, with an Indonesian lass then aged 22 ("Kod" Indonesian Passport H385922).

[2] His problems started at birth.

[3] The father of the appellant due to ignorance, negligence or forgetfulness failed to register the birth of the appellant until after his (the father's) marriage to the Indonesian lass was registered under Malaysian law. Not due to the laws of Indonesia but by the procedures of the Registrar of Births and Deaths, Sarawak, the appellant was deemed an Indonesian national in his birth certificate (SK024571) which was registered on 23 August 2000. The appellant was born on 28 December 1997, a late registration by some three years.

[4] The appellant knew of no home other than Sarawak. The appellant then had a sister who procured a Malaysian identity card as their parents were by then lawfully married in the eyes of Malaysian law.

[5] The appellant became, through no fault or overt act of his, an alien in his own home and family. He has spent his entire life in Sarawak. He knows of no other country which he could call home. He never stepped foot outside Sarawak nor into Indonesia. He was not issued with an Indonesian passport to evidence his alleged nationality in his birth certificate.

[6] All attempts to apply for Malaysian citizenship since 2010 had drawn a blank. The father of the applicant was verbally informed by Jabatan Pendaftaran Negara (JPN) that the appellant shall make use of his birth certificate as the basis of his identity in order to stay and register for any transaction or for schooling in Sarawak.

[7] The appellant was duly educated in local schools completing both primary and secondary education up to Form 5 at Pending Secondary School, Kuching, and was in gainful employment until that fateful day on

14 April 2019 when in a routine investigation by the Immigration Authorities the appellant was apprehended, arrested and charged under s. 6(1)(c) of the Immigration Act 1959/63. The appellant was charged as follows:

> Bahawa kamu, pada 14th April 2019 jam lebih kurang 1540 hours, bertempat di kedai Wood Monkey Sdn. Bhd. L78, No 26, Lebuh Carpenter, 93300 dalam Daerah Kuching, di dalam Negeri Sarawak tanpa sebab yang munasabah telah tinggal di Sarawak, Malaysia tanpa document perjalanan yang sah. Oleh yang demikian kamu telah melanggar peruntukan Sekseyen 6(1)(c) Akta Imigresen 1959/63 (Pindaan 2001), satu kesalahan yang boleh di hukum di bawah Seksyen 6(3) Akta yang sama ...

[8] The appellant pleaded guilty and the learned Sessions Court Judge sentenced the otherwise law-abiding and understandably bewildered appellant to four months' imprisonment and one stroke of the cane.

[9] An application to the Sessions Court for a stay was not successful and the appellant then applied by notice of motion and a certificate of urgency to this court for a stay of execution pending the appeal. I granted the stay on 17 May 2019 after hearing oral submissions by both the DPP and the appellant's counsel.

[10] The appellant has no record of any past convictions. The DPP did not object to the stay. I ordered the appellant to be released immediately but on condition that he reports to the police station near his abode once every fortnight until his appeal is heard and adjudicated upon. The appellant is appealing to this court against his conviction and sentence.

The Law

[11] The appellant is charged under s. 6(1)(c) of the Immigration Act 1959/1963 which states:

> 6(1) No person other than a citizen shall **enter** Malaysia unless (emphasis added):
>
> (a) he is in possession of a valid Entry Permit lawfully issued to him under section 10;
>
> (b) his name is endorsed upon a valid Entry Permit in accordance with section 12, and he is in the company of the holder of the Permit;
>
> (c) **he is in possession of a valid Pass lawfully issued to him to enter Malaysia**; or
>
> (d) he is exempted from this section by an order made under section 55.

[12] The Immigration Act 1959/63 in s. 2, provides a definition of "entry" which is intended to cover the grammatical variant of "enter":

"entry" means:

(a) In the case of a person arriving by sea, disembarking in Malaysia from the vessel in which he arrives;

(b) In the case of a person arriving by air at an authorised airport, leaving the precincts of the airport;

(c) In the case of a person entering by land and proceeding to an immigration control post in accordance with section 26, leaving the precincts of the post for any purpose other than of departing from Malaysia by an approved route; and

(d) In any other case, any entry into Malaysia by land, sea or air.

[13] Section 4(1) of the Interpretation Acts 1948 and 1967 states:

Section 4 (1) Where any word or expression is defined in a written law, the definition shall extend to all grammatical variations and cognate expressions of the word or expression so defined.

Revisionary Powers Of The High Court

[14] In *Sukma Darmawan Sasmitaat Madja v. PP* [2007] 4 CLJ 697; [2007] 5 MLJ 666 the Court of Appeal held that the supervisory jurisdiction of the High Court conferred by the Courts of Judicature Act 1964 s. 35(1) exists to correct a miscarriage of justice and it is central to the exercise of that power that an applicant be permitted to bring matters of complaint to the High Court by way of affidavit evidence. (*Civil and Criminal Appeals in Malaysia* (Sweet and Maxwell), 3rd edn, at p. 383).

[15] Section 325 of the Criminal Procedure Code states:

325(1) A Judge may, in any case the record of proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.

[16] Section 316 of the Criminal Procedure Code, paraphrased:

316. At the hearing of the appeal the Judge ... may:

(b) in an appeal from a conviction or in an appeal as to sentence-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried;

[17] In *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163; [1987] 2 MLJ 69, the Supreme Court observed that the object of the revisionary powers provided in the CPC is to confer upon the criminal courts a kind of paternal or supervisory jurisdiction in order to correct a miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or, on the other hand, in some undeserved hardship to individuals. In this connection, it is to be observed that in a revision, the main question to be considered is whether substantial justice has been done or will be done and whether any other order made by the lower court should be interfered with in the interest of justice (*Civil and Criminal Appeals in Malaysia* (Sweet and Maxwell) 3rd edn, at p. 384).

[18] It is settled law that when the High Court has before it on appeal a record of criminal proceedings, the condition precedent for the exercise of the power of revision has been fulfilled. (*Civil and Criminal Appeals in Malaysia* (Sweet and Maxwell), 3rd edn, at p. 387).

[19] The grounds of my decision in this case has very little connection to the substantive grounds of appeal pleaded by the appellant, which appears to me to be premised on humanitarian issues of an accused suffering for the sins of his father. However, it is clear that the duty of a High Court Judge sitting in his revisionary capacity is not confined to matters raised by the parties only. The judge may, in appropriate cases, pry into the deeper aspects of the case so as to ensure the substantial justice subsists between the accused and the accuser (*Re Pang Po Pah* [1982] CLJ 557; [1982] CLJ (Rep) 623; [1985] 2 MLJ 214).

Decision

[20] In the premises and with the greatest respect to the immigration officials, and in the exercise of this court's revisionary powers as outlined above, it was wrong for the appellant to be charged under s. 6(1)(c). The appellant never "entered" Sarawak by land, by air or by sea. The appellant was conceived in Sarawak and entered Sarawak, or rather this world, on a maternity bed in Bau, already in Sarawak. The appellant, like all of us, had no choice as to where he was born.

[21] Hence, the key ingredient central to the offence in s. 6(1)(c), that is to say, "entry", is totally inapplicable as against the locally born appellant.

[22] If Parliament had intended s. 6(1) to encompass persons of the appellant's birth and circumstance, the term "entry" in s. 2 of the Immigration Act would have been defined to cover such a situation, but it did not.

[23] The appellant may be of a category of persons who may be prosecuted under other provisions of the Immigration Act 1959/1963, but under our system of adversarial jurisprudence, it is not up to this court to discover it.

[24] It is clear that Parliament intended persons such as the appellant to be treated or classified differently from those "entering" Malaysia illegally. Hence the usual orders and procedures applicable to illegal immigrants should not and cannot apply to the appellant and his like. Put simply, the appellant is not an "illegal immigrant" because he never "entered" Sarawak from another sovereign State. He was, as the uncontroverted evidence established, born within the jurisdictional boundaries of Sarawak.

[25] I fully appreciate and am aware of the enormous task faced by our immigration officials in protecting our boundaries and thus ensuring that our nation's resources serve only our citizens and our permitted residents. We have already seen, all too often, the kind of social damage and incidence of crime heavily wrought on our society and blamed on those entering our nation illegally. But any enforcement and action against these human beings must nevertheless be in accordance with the law.

Further Observations

[26] I wish to make the following additional observations.

The Charge

[27] It is probable that the Immigration Authorities themselves are aware of the shortcomings of the s. 6 of the Immigration Act in relation to locally born persons such as the appellant.

[28] I say this because the charge fails to accuse the appellant of "entering" Sarawak which to my mind is a key ingredient of the offence. An extract of the charge to illustrate this:

> Bahawa kamu, pada 14th April 2019 jam lebih kurang 1540 hours, bertempat di kedai Wood Monkey Sdn. Bhd. L78, No26, Lebuh Carpenter, 93300 dalam Daerah Kuching, di dalam Negeri Sarawak tanpa sebab yang munasabah telah tinggal di Sarawak, Malaysia tanpa document perjalanan yang sah …

[29] It is a fundamental principle of criminal law that the accused should be informed with certainty and accuracy of the exact nature of the charge brought against him, otherwise he may be severely prejudiced in his defence. (see s. 152 of the Criminal Procedure Code and at *Janab's Key to Criminal Procedure,* 4th edn, at p. 348).

A *The Birth Certificate*

[30] The appellant's birth certificate describes his nationality as "Indonesian". It is assumed that Registrar made such an entry as the child was illegitimate and his mother was regarded as his sole guardian. The legislation for the registration of births and deaths is silent about any new born's stipulated nationality. Understandably so, as the legal draftsmen would have known that it is not possible for the Malaysian authorities to determine the nationality of a person born in Malaysia on behalf of another independent and sovereign State.

[31] In Sarawak, the Guardianship of Infants Ordinance (Cap 93) of Sarawak does not make a distinction between a legitimate or illegitimate child in guardianship matters and thus is at odds with the practice of causing the illegitimate child to automatically follow the mother's nationality. In Sarawak, the rights of each biological parent appear to rank equally.

Section 2 (paraphrasing):

> Section 2. … the father of an infant shall not be deemed to have any right superior to that of the mother in respect of such custody, administration or application nor shall the mother have any claim superior to that of the father.

The Guilty Plea

[32] In *Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 2 CLJ 209; [1995] 1 AMR 828, Gopal Sri Ram JCA stated that under s. 305 of the CPC, an accused who has been convicted on his plea of guilty is entitled to appeal against the extent and legality of his sentence only.

[33] However, even in a plea of guilty and no appeal at all is lodged, the High Court Judge may also exercise his revisionary powers to set aside the conviction if it is found out that the plea of guilty was equivocal (*PP v. Mohd Tajuddin Ahmad* [1997] 2 CLJ 913). I am satisfied that this appeal before me where I am asked to exercise my revisionary powers is not being used as a back door appeal against a guilty plea.

Order

[34] It now leaves me no alternative but to allow the appellant's appeal and to quash the conviction against him. It follows that the sentence is likewise quashed. The appellant is freed from any of the earlier orders of court.

[35] My order does not solve the problems of the appellant. He remains, in my mind, stateless, despite the Registrar of Births and Deaths unilaterally declaring him an Indonesian national in his birth certificate.

[36] It was recently and prominently reported in the local Sarawak press that the Sarawak State Government is revamping the committee tasked to look into citizenship of people such as the appellant.

[37] I order that the appellant's counsel serve the ruling of this court on the Immigration Department, and/or to such relevant committee as soon as possible with an expressed request that the appellant, who has been in all respects brought up as a law-abiding Malaysian, would see his application for citizenship be processed quickly. His only crime, if I can call it such, was his poor choice of parents.